United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

235

No. 19,775

CARLISLE ADKINS, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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QUESTIONS PRESENTED

1. Whether appellant's appeal is timely under Rule 37(a)(2) when appellant delivered his notice of appeal to a jail official on the seventh day after judgment was entered and the Clerk of the District Court received the notice two days later, although the notice was not stamped "filed" until two weeks later.

2. Whether an appeal from a judgment resulting from a plea of guilty is inappropriate merely because appellant would also be entitled to relief under Rule 32 (d) and 18 U.S.C. §2255.

3. Whether appellant's plea of guilty was made involuntarily and appellant was denied the effective assistance of counsel and a fair trial where appellant's counsel:

(1) Waived preliminary hearing without consultation with appellant when the hearing could have been very beneficial, (2) did not consult with him concerning arraignment, (3) made little or not effort to prepare a

defense or to prepare to weaken the Government's case, (4) committed a series of prejudicial errors during trial, (5) failed to challenge a potentially biased juror, (6) admitted a lack of knowledge of facts and law highly pertinent to appellant's defense, (7) admitted a lack of knowledge as to which count of the indictment appellant was to plead guilty to, (8) drank whiskey during a recess in the trial, (9) failed to request an examination of appellant's mental competency to plead guilty although he necessarily had knowlege establishing appellant's incompetency prima facie, (10) made an inadequate plea in mitigation of the sentence, and (11) failed to notice an appeal despite a reminder by the sentencing judge concerning the time within which to appeal.

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TABLE OF AUTHORITIES

Other:

*Cases or authorities chiefly related upon are marked by asterisks.

JURISDICTIONAL STATEMENT

Appellant appeals from a conviction in the United States District Court for the District of Columbia on an indictment charging him on twelve counts with violation of 18 U.S.C. § 495 (forging and uttering as true a writing for the purpose of obtaining money from the United States) and § 1708 (possessing mail which had been stolen, knowing the same had been stolen). On June 22, 1965, after the Government had presented most of its case, the appellant pleaded guilty to Count I of the indictment.[1/] On September 10, 1965, appellant was sentenced to eighteen to fifty-four months.

On October 5, 1965, the District Court authorized appellant to proceed on appeal without payment of costs. On October 6, 1965, the District Court (1) ordered that the testimony of witnesses before the District Court be prepared at the expense of the United States and (2) referred to this Court appellant's request for the appointment of counsel on appeal. On January 20, 1966, counsel for appellant on this appeal was appointed.

1/ Tr. 81A-87. At the commencement of the trial on June 22, the District Court granted the Government's motion to dismiss three counts. On September 10 the District Court granted the Government's motion to dismiss the remaining eight counts in the indictment.

The jurisdiction of the Court on appeal is founded upon the Act of June 25, 1948, 62 Stat. 929, 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant was arrested on March 1, 1965. On March 4 appellant's counsel waived preliminary hearing before the U.S. Commissioner.

The grand jury returned a twelve-count indictment against appellant on April 20. Appellant pleaded not guilty at arraignment on April 22. On June 22, after the Government had put on most of its case before District Judge Leonard P. Walsh, appellant pleaded guilty to one count of the indictment. Appellant underwent psychiatric examination at Saint Elizabeth's Hospital for approximately two months. On September 20, Judge Walsh sentenced appellant to eighteen to fifty-four months.

Appellant has, in this Statement, only summarized the procedural events in the court below. A detailed statement of the facts relating to each stage of the proceedings below is presented in Part III of the Argument under an appropriate heading.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fourth Amendment to the U. S. Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the U. S. Constitution:

> "No person shall be held to answer for a capital, or otherwide infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the U. S. Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and case of the accusation;

to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Rule 37 of the Federal Rules of Criminal Procedure:

"Rule 37. Taking Appeal; and Petition for Writ of Certiorari

(a) Taking Appeal to a Court of Appeals.
(1) Notice of Appeal. An appeal permitted by law from a district court to a court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. . . .

(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion."

STATEMENT OF POINTS

I. APPELLANT'S APPEAL IS TIMELY UNDER RULE 37(a)(2) BECAUSE APPELLANT DID ALL HE COULD REASONABLY BE EXPECTED TO DO TO FILE HIS NOTICE OF APPEAL WITHIN TEN DAYS AFTER HIS CONVICTION AND HIS NOTICE OF APPEAL WAS IN THE CUSTODY OF THE CLERK OF THE DISTRICT COURT ON THE NINTH DAY AFTER THE ENTRY OF JUDGMENT.

II. THE APPEAL IS PERMISSIBLE EVEN THOUGH APPELLANT WOULD BE ENTITLED TO RELIEF UNDER RULE 32(d) OR 18 U.S.C. § 2255.

III. APPELLANT'S PLEA OF GUILTY WAS NOT MADE VOLUNTARILY AND INTELLIGENTLY AND WAS NOT MADE WITH THE EFFECTIVE ASSISTANCE OF COUNSEL.

SUMMARY OF ARGUMENT

1. The Court has asked counsel to address the question of whether appellant's appeal was timely under Rule 37(a)(2). The judgment below was filed on September 13, 1965. Appellant's Notice of Appeal was not filed by the District Court clerk until October 5, 1965, more than ten days after the judgment was filed. However, the record shows that appellant gave the Notice to a D.C. Jail official on September 20, and the Notice was received in the Clerk's office on September 22, only nine days after the judgment was filed. Under these circumstances the Notice was timely.

2. Appellant is properly before this Court on direct appeal. That appellant would be entitled to relief under Rule 32(d) or 18 U.S.C. § 2255 does not detract from the fact that the issues raised herein should be determined by the Court on direct appeal.

3. Appellant was denied the effective assistance of counsel throughout the proceedings against him, in violation of the Sixth Amendment. Counsel waived preliminary hearing without consultation with appellant,* did not

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* Facts established by affidavit attached to this Brief rather than by the record are marked by asterisks.

consult with him concerning arraignment,* made little or no effort to prepare a defense or to prepare to challenge the Government's case, committed a series of prejudicial errors at trial, admitted a lack of knowledge of facts and law highly pertinent to appellant's defense, did not know the count of the indictment to which appellant was to plead guilty, drank whisky during a recess in the trial,* failed to request an examination of appellant's mental competency to plead guilty although he necessarily had knowledge establishing incompetency prima facie, made an inadequate plea in mitigation of the sentence, and failed to notice an appeal.

The incompetence of counsel, in conjunction with the facts that appellant was arrested without probable cause,* denied a preliminary hearing without his consent,* and tried by a potentially biased jury, deprived appellant of a fair trial, to which he was entitled under the due process clause of the Fifth Amendment. The unfairness

of the proceedings against him induced appellant to plead guilty involuntarily.

ARGUMENT

I. APPELLANT'S APPEAL IS TIMELY UNDER RULE 37(a)(2) BECAUSE APPELLANT DID ALL HE COULD REASONABLY BE EXPECTED TO DO TO FILE HIS NOTICE OF APPEAL WITHIN TEN DAYS AFTER HIS CONVICTION AND HIS NOTICE OF APPEAL WAS IN THE CUSTODY OF THE CLERK OF THE DISTRICT COURT ON THE NINTH DAY AFTER THE ENTRY OF JUDGMENT.

The Court's Order filed on April 8, 1966, states that Chief Judge Bazelon would request counsel to brief the question whether or not the appeal is timely under Rule 37(a)(2) of the Federal Rules of Criminal Procedure.

The District Court's docket indicates that the judgment was filed on September 13, 1965. Appellant's affidavit in support of an application to proceed in forma pauperis was filed on September 24. On October 5, the District Court granted appellant's application and filed his notice of appeal.

Certain facts not reflected by the docket entries establish that appellant's appeal is timely. On Monday, September 20, seven days after the entry of judgment, appellant, who was at the time still in the D. C. Jail, appeared before Orange C. Dickey, a notary public and Classifications Officer at the Jail. Dickey notarized both the "Affidavit in Support of Application for Leave

to Proceed Without Prepayment of Cost" and the "Notice of Appeal." Appellant left the documents in Dickey's custody and was advised that they would be delivered to the District Court by the U. S. Marshal.

On Wednesday, September 22, nine days after the entry of judgment, the papers were "received" by the District Court. Both the reverse side of the third page of appellant's papers and the unstamped envelope which contained them are marked "RECEIVED -- Sep 22 1965 -- HARRY M. HULL, CLERK." Not until Friday, September 24 did the Clerk stamp the Affidavit "filed." And not until October 5, when Judge Walsh granted appellant's request to proceed in forma pauperis, did the Clerk stamp the Notice of Appeal "filed."[1/]

Rule 37(a)(2) provides that a defendant may take an appeal within ten days after entry of judgment. An appeal "is taken by filing with the district court a notice of

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1/ Why the Affidavit was filed on September 24 but the Notice not until October 5 is unclear. Since the Notice appeared as the second of three pages it is not unlikely that the Clerk did not realize that more than one document was involved.

appeal." (Rule 37(a)(1).) If Rule 37 were read literally appellant's appeal would not be timely since it was not filed until October 5, twenty-two days after the entry of judgment. However, the Supreme Court has stated that Rule 37 is satisfied if the appellant "had done all that could reasonably be expected to get the . . . [Notice] to its destination within the required 10 days." Fallen v. United States, 378 U.S. 139, 144 (1964).

The Fallen standard has clearly been met here. Appellant gave the Notice to an official of the D. C. Jail on September 20, only seven days after the entry of judgment. The Notice was in the District Court's hands on September 22. Under these circumstances it is difficult to conceive of what more appellant could have done to comply with Rule 37.

II. THE APPEAL IS PERMISSIBLE EVEN THOUGH APPELLANT WOULD BE ENTITLED TO RELIEF UNDER RULE 32(d) OR 18 U.S.C. § 2255.

Section 1291 of 18 U.S.C. provides that "the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts." Imposition of sentence is a final decision in criminal matters. Corey v. United States, 375 U.S. 169, 174 (1963). As shown in Part I, appellant's appeal is timely. The issues which appellant raises are fully supported by the record before this Court and can be considered without the necessity of a further evidentiary proceeding before the District Court. That some of the issues which we raise here could also be raised under a Rule 32(d) or Section 2255 proceeding, and that the factual predicates for some of the issues could be further developed in an evidentiary hearing, does not detract from the fact that the issues are properly before the Court. If the Court decides that it would prefer to have a more complete evidentiary record on any point, we request, for the reasons suggested elsewhere in this Brief, that the Court retain jurisdiction of this appeal rather than require appellant to proceed de novo under Rule 32(d) or Section 2255. We would point out, however, that the Court

has considered affidavits on direct appeals from a conviction based on a guilty plea, Gadsden v. United States, 96 U.S. App. D.C. 162, 223 F.2d 627, 630 n.4 (D.C. Cir. 1955), and would request the Court to do so here.

It is not necessary that appellant have moved under Rule 32(d) to withdraw his plea of guilty before appealing to this Court. This conclusion is supported by Bell v. Anderson, 345 F.2d 99 (D.C. Cir. 1965) (per curiam). The Court treated the appeal there involved as an appeal from the dismissal of a habeas corpus petition and as a direct appeal from a conviction after a plea of guilty. The Court does not suggest that appellant should have filed a Rule 32(d) motion before seeking an appeal. Furthermore, a requirement that such a motion be made would, of course, effectively preclude a defendant who pleads guilty from taking a direct appeal, since it is unlikely that such a defendant would be able to comply with the requirement of Rule 37(a)(2) that appeals be filed within ten days of the entry of judgment. Such a requirement would be analogous to requiring a defendant who is convicted to move for a new trial before appealing.

Further, such a requirement would be especially unfortunate under the circumstances presented by this case. Appellant's plea was coerced. Rule 32(d), as interpreted by this Court, requires the defendant to demonstrate his innocence as well as to convince the court that "manifest injustice" has been committed. Watts v. United States, 107 U.S. App. D.C. 367, 278 F.2d 247 (D.C. Cir. 1960). While the Court in Watts recognized that the defendant need not affirm his innocence if the original plea was coerced, we submit that even if appellant's plea were held not to be coerced the affirmance should not be required where appellant had ineffective assistance of counsel at the time he decided to plead. Moreover, appellant was denied effective counsel during the period between his plea and the sentencing. "Manifest injustice" need only be established where a defendant seeks to withdraw a plea after sentencing. Effective counsel would have advised appellant to withdraw the plea before sentencing. Because appellant was denied effective assistance of counsel, appellant would now be compelled to meet the higher standard of "manifest injustice."

Likewise, it would be inappropriate to require appellant to proceed under Section 2255. If the District Court were to conclude in a 2255 proceeding that appellant's plea was voluntary, the other important issues raised by appellant here might be permanently foreclosed from consideration by this Court. United States v. Farrar, 346 F.2d 375 (7th Cir. 1965). The Court has frequently referred to its function of supervising the administration of justice in the District Court. This case provides an important vehicle for the Court to perform its supervisory function.

Finally, appeal is appropriate here because appellant deserves immediate relief. Appellant has been confined either at Saint Elizabeth's, the D.C. Jail or Lorton Reformatory since June 22, 1965. If appellant is required to commence a new action, either under Rule 32(d) or Section 2255, it will be many more months before the issues presented here are finally resolved.

III. APPELLANT'S PLEA OF GUILTY WAS NOT MADE VOLUNTARILY AND INTELLIGENTLY AND WAS NOT MADE WITH THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant pleaded guilty to one count of forgery during his trial. Evidence of record or in the affidavits annexed to this Brief indicates that appellant had been arrested without probable case,* deprived of a preliminary hearing* and of an impartial jury, and denied the effective assistance of counsel during the course of the proceedings against him. Moreover, appellant did not receive the effective assistance of counsel in determining to plead guilty, and substantial doubt concerning his mental competency to plead guilty exists.

In this part of the Brief, the proceedings against appellant are traced in chronological order to reveal prejudicial errors and deprivation of the right to counsel at several stages in the proceedings. Some of these errors require reversal of appellant's conviction when considered alone. Moreover, the cumulative effect of the ineffectiveness of counsel throughout the proceedings establishes that appellant was denied his Sixth Amendment right to counsel when he made his guilty plea. The unfairness of the proceedings, when considered

as a whole, establishes that appellant's plea of guilty was not voluntary but rather the product of a disillusionment with the judicial process and of a belief that he would not obtain justice.

Although the record in this case presents a sufficient basis for a decision reversing appellant's conviction, affidavits of facts supplementing the record accompany this Brief. Facts derived from the affidavits only are indicated by asterisks.

The record alone indicates that appellant's plea of guilty was not made with the effective assistance of counsel. It also demonstrates that such unfairness attended the proceedings against appellant that his plea of guilty was involuntary in that it was induced by a desire to defend himself against the greater injustice of continuing with trial. Therefore, on the basis of the record alone, this Court should reverse appellant's conviction, order that the guilty plea be vacated, and order that the indictment be dismissed. The unfairness of the proceedings against appellant necessarily so adversely affected his state of mind toward the judicial process that he is incapable of aiding in his defense. It is "just under the

circumstances" to dismiss the indictment. 28 U.S.C. §2106 (1964); Butler v. District of Columbia, 346 F.2d 798 (D.C. Cir. 1965). In the alternative, this Court should grant appellant a new trial.

As a third possible disposition of this case, the Court could remit appellant's sentence. As will be developed in this part of the Brief, the unfairness of the proceedings against appellant was extreme. He has been incarcerated for more than a year, for two months prior to his plea of guilty, for more than two months prior to sentencing, and for almost eight months since sentencing. He was sentenced to imprisonment for eighteen to fifty-four months. He suffers from hypertension and diabetes. It would be "just under the circumstances" to remit his sentence. 28 U.S.C. § 2106 (1964).

The affidavits accompanying this Brief tend to show that appellant was arrested without probable cause* and was deprived of a preliminary hearing* and further illustrate the ineffectiveness of appellant's counsel. This Court has received and considered such affidavits in previous cases -- see, e.g., Gadsden v. United States, 96 U.S. App. D.C. 162, 223 F.2d 627, 630 n. 4 (D.C. Cir. 1955) -- and they certainly would be considered on a motion to withdraw a guilty plea or on collateral attack. Since it would substantially prejudice

appellant to be required to proceed on collateral attack or by a motion to withdraw his guilty plea, as discussed in Part II, supra, this Court should consider these affidavits. If the Court refuses to consider the affidavits and rules that the facts contained in the record are insufficient for reversal, it should order the District Court to hold an evidentiary hearing on the facts contained in the affidavits and should retain the appeal pending the District Court's report. See, e.g., Smith v. United States, 118 U.S. App. D.C. 235, 335 F.2d 270 (D.C. Cir. 1964).

A. Arrest -- Appellant Was Arrested Without Probable Cause

At about 10:30 p.m. on the evening of Monday, March 1, 1965, appellant was standing in line at a carry-out shop.* A man, accompanied by two uniformed police officers, approached him and accused him of having cashed a forged check several months before at a liquor store at which the accuser was employed.* The police officers then kept appellant in their custody while they called the Tenth and Second Precincts to determine whether any warrant or complaint had been filed against appellant.* Neither Precinct reported anything, but Lt. O'Bryant of the Second Precinct told the officers to hold appellant while he dispatched Detectives Fred Egbers and James

C. Butler to bring appellant in for questioning.* Appellant was held at the Second Precinct and questioned by Kenneth Thompson of the U. S. Secret Service.* Finally, appellant was taken to the First Precinct, fingerprinted, and locked up at about 1:15 a.m.*

We contend that appellant's arrest was without a warrant or probable cause and was, therefore, in violation of appellant's Fourth Amendment rights. We do not contend that appellant's unconstitutional arrest is, in and of itself, a ground for any of the relief which appellant seeks. However, when viewed in conjunction with the other elements in appellant's case, the unlawful arrest lends important support to our contention that appellant's eventual plea of guilty was forced upon him by an unbroken series of injustices, some great and some small.

The facts as set forth in appellant's affidavit (Exhibit A) indicate that the arrest was unconstitutional. The arrest probably occurred when the police officers kept appellant in their custody while they called the Precincts. Kelley v. United States, 111 U.S. App. D.C. 396, 298 F.2d 310 (D.C. Cir. 1961). The officers at that time were without a warrant and lacked probable cause. Probable cause was lacking because there was,

in all likelihood, no basis upon which the officers could credit the statements of the informant. Wong Sun v. United States, 371 U.S. 471, 479-80 (1963); Jackson v. United States, 118 U.S. App. D.C. 341, 336 F.2d 579, 580 (D.C. Cir. 1964) (per curiam).

Even if the arrest did not occur until after the detectives arrived, probable cause was still lacking. There is no indication on the record that Lt. O'Bryant who directed the officers to hold appellant had any knowledge that could be imputed to the arresting officers. Williams v. United States, 113 U.S. App. D.C. 371, 308 F.2d 326 (D.C. Cir. 1962).

B. Preliminary Hearing

On March 2, 1965, appellant without counsel was brought before the United States Commissioner for the District of Columbia on a charge of forgery, and the preliminary hearing was continued to allow him to contact counsel. On March 2 or 3, 1965, appellant conferred with Marilyn Cohen, an attorney from the Legal Aid Agency, who was to represent him at the preliminary hearing.* They decided not to waive preliminary hearing.* On March 4, 1965, appellant again appeared before the United States Commissioner, accompanied by Miss Cohen.* In the hearing room the Commissioner asked who represented the appellant, and Frederick Wilson of the D. C. Bar stepped forward, stating that he had been retained by appellant's wife.* Legal Aid counsel then withdrew.* Mr. Wilson had been hired the previous day by appellant's wife, who knew nothing of the circumstances of appellant's arrest or of the charge against him.* She knew only that appellant was in jail.* Mr. Wilson had not spoken to appellant prior to his statement in the hearing room that he represented appellant.* No one asked appellant who represented him or if he were willing to have Mr. Wilson represent him and appellant said nothing.*

The United States Commissioner asked if appellant waived preliminary hearing. Mr. Wilson replied that he did, without consultation with appellant.*

A preliminary hearing provides an accused his only opportunity to have determined in an adversary proceeding whether or not probable cause exists to detain him for arraignment and trial. Although presence or lack of probable cause is also determined in Grand Jury proceedings, those proceedings have traditionally been kept secret; in them an accused is denied the right of counsel and is given no opportunity to conduct cross-examination or to confront his accusers in a meaningful manner. At a preliminary hearing, however, a fairer balance is struck. The accused is not brought defenseless to confront the state; instead, he is represented by counsel, who has had an opportunity to prepare relevant lines of questioning and to ferret out the facts necessary to present the accused's version of the events leading to his arrest. Because such hearings are required by law to be held immediately or as soon as possible after arrest, the facts are fresh in the minds of all witnesses; the opportunity for distortion is minimized; and the Sixth Amendment right of confrontation is

thus meaningful. In such a proceeding, an accused is offered the best opportunity he will have until his trial months later to receive a fair determination as to whether there is probable cause for his detention.

In addition to this important function of the preliminary hearing, this Court has delineated similarly important opportunities which a hearing provides an accused. Thus, in Blue v. United States, 342 F.2d 894 (D.C. Cir. 1964), cert. denied, 380 U.S. 944 (1965), this Court stated that "Preliminary inquiries can on occasion have great value for one charged with crime," (id. at 899) by making available "a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him" (id. at 901). In Washington v. Clemmer, 339 F.2d 715 (D.C. Cir 1964), this Court emphasized the opportunity that a hearing provides for developing impeachment material. The Court said: "verbatim recording of testimony at an early stage of the process perpetuates the fresh memory of witnesses, . . . allowing impeachment or refreshing of recollection at trial." Id. at 717. Still another function of the preliminary hearing was stressed in this Court's decision in Dancy v.

United States, No. 18716, decided October 14, 1965. In pointing to the prejudice resulting to the appellant from the denial of a counsel at preliminary hearing, this Court emphasized the fact that, had a hearing been held, "the development of appellant's version of the facts might have been furthered."

To make meaningful its decisions holding that the preliminary hearing is an integral, vital part of the criminal process, this Court in Blue v. United States, supra, established the rule that a criminal defendant is deprived of his rights unless he is accorded "a meaningful opportunity to elect to have a preliminary hearing." In the same decision, the Court ruled that the presence of counsel at the time of election is indispensable to a showing that an accused's choice was a meaningful one.

Apart from the requirement that counsel be present, this Court has been slow to evolve criteria for determining when an accused has been offered a "meaningful opportunity" to elect a hearing. In Hairston v. United States, No. 19594, decided March 31, 1966, appellant advanced the proposition that, because of the importance of a preliminary hearing to an accused, waiver of a hearing must be accompanied by all of the safeguards

which the Supreme Court and this Court have required for waiver of other fundamental rights. Specifically, appellant in Hairston urged this Court to rule that the judicial officer before whom a waiver is made should make an independent determination on the record that the defendant is fully aware of the consequences of his action. Appellant in the present case endorses the argument in Hairston that absent a record showing that a knowledgeable, understanding waiver has been made there is a danger that the mere physical presence of counsel will be deemed sufficient to satisfy what should be a requirement for effective assistance of counsel. The facts in this case provide a perfect illustration of that danger.

Here, the Blue requirement was satisfied; the record shows that appellant's counsel was physically present when opportunity for a preliminary hearing was waived. Despite this fact, appellant's rights were grossly violated. Counsel, without consultation with appellant, without so much as inquiring into his version of the facts of the case, proceeded to waive hearing.* The situation is further aggravated by the fact that appellant, in previous consultation with a Legal Aid attorney, had decided that a hearing was indispensable to the

preparation of his case.* However, because the judicial officer who accepted the waiver did not even inquire as to whether appellant acquiesced in his lawyer's decision, much less as to whether he understood the full implications of that decision, appellant was denied a proceeding which could have been of crucial importance to the preparation of his defense.* To prevent the recurrence of this kind of situation, appellant urges this Court to adopt the rule advocated in the Hairston case and to insist that the judicial officer accepting waiver of a preliminary hearing make an independent inquiry as to whether the accused acquiesces in his counsel's waiver, is aware of the importance of a hearing, and understands the full implications of a waiver.

Should the Court refuse to adopt such a ruling, a finding that appellant's waiver was invalid is nonetheless unavoidable under the previous decisions of this Court. In the Hairston case, the Court amplified the Blue rule that all defendants must be offered a meaningful opportunity to elect a hearing. In refusing to reverse Hairston's conviction, the Court emphasized that not only was counsel present, as required by the Blue decision, but in addition, "appellant

conferred with counsel before preliminary examination was waived." The Court developed the point further when it stated: "It is not alleged that appellant did not participate in the decision to waive preliminary hearing." Thus, it is clear that in this jurisdiction, if a waiver of a preliminary hearing is to be a valid one, not only must counsel be present, but there must be some evidence that counsel actually conferred with the accused.

In the present case, the evidence is to the contrary. As is stated above, Mr. Wilson, the attorney retained by appellant's wife, never spoke to appellant and thus never made the effort to acquire from appellant any information on which to base an intelligent legal opinion as to whether a hearing would advance or interfere with the development of the defense.* When there is such blatant evidence as to the ineffectiveness of counsel --i.e., a showing that counsel never consulted with the defendant -- this Court has clearly indicated that the situation should be treated as though no counsel at all were present and the waiver should be considered invalid.

Protection of the rights of a criminal defendant requires that waiver of a preliminary hearing can be accepted only

after a showing that the waiver was made after consultation with the defendant. A defendant whose waiver has been accepted without such a showing has not been afforded sufficient protection of his right and should be entitled to a reversal of his conviction. Because lack of a hearing is inherently prejudicial to the preparation of a criminal defense, there should be no need to make a specific showing of prejudice. However, this Court has established the rule that the appropriate time for correcting the denial of a preliminary hearing is at or before trial and has refused to reverse a conviction except on a specific showing of prejudice. Blue v. United States, supra; Shelton and Pannell v. United States, 343 F.2d 347 (D.C. Cir 1965); Dancy v. United States, No. 18716, decided Oct. 14, 1965.

The measure of prejudice required for reversal has not yet been clearly defined. The Blue case indicated that one seeking to establish prejudice must show that his inability to acquaint himself in greater detail with the case against him "so handicapped him in his first trial as to require a second." 342 F.2d at 901. And the Dancy decision stated that a showing of prejudice sufficient to justify reversal is

made when the absence of defense counsel "at the preliminary hearing deprived counsel of the opportunity to make a clear presentation of the matter to the jury."

A clear showing of prejudice exists in the present case. First, facts have been elicited from appellant which indicate that his arrest probably violated his Fourth Amendment rights.* Neither Mr. Wilson, nor appellant's subsequent counsel, Mr. Brownlow, made any attempt to elicit the precise facts leading up to the arrest.* The preliminary hearing presented the only opportunity for raising this contention.

Secondly, the trial transcript shows, despite the inadequacy of the cross-examination conducted by Mr. Brownlow, a lack of certainty and consistency in the testimony of some of the prosecution witnesses. At a preliminary hearing, counsel for defendant could have confronted these witnesses and obtained an early, accurate impression as to the veracity of their presentation of the facts. Where inconsistencies emerged, he could have developed impeachment material to be used at trial. Further, guidelines would have been established for the preparation of appellant's defense, which would have been extremely helpful.

Thirdly, if a guilty plea had been appropriate in this case, and we do not concede that it was, it would have been far more advantageous to appellant to have made it prior to trial proceedings, instead of waiting until the trial was almost over. Not only would the chance of a short sentence be increased, but, of course, that sentence could have been served more promptly. Had a preliminary hearing been held, appellant could have determined immediately the strength of the Government's case and could have resolved, on the basis of the evidence presented at the hearing, the manner in which he should have pleaded.

Finally, the most significant prejudice which resulted to appellant from the automatic waiver of his preliminary hearing was the evidence which it provided to support his impression that the criminal process is inherently unjust. The fact that someone else could waive an important right of his without even consulting him was a major contribution to the overall injustice that pervaded the entire proceedings against him. Combined with the other unfair elements of this trial, the waiver of his hearing led to the sense of futility and lack of hope of ever obtaining a fair hearing

that in turn led appellant to reverse his plea from not guilty to guilty. In short, the waiver is a significant element in establishing the involuntariness of appellant's guilty plea.

C. Arraignment - Appellant Was Deprived of the Effective Assistance of Counsel.

After preliminary hearing appellant returned to the District of Columbia Jail without having spoken to Mr. Wilson.* Later, appellant's wife asked Mr. Wilson to visit appellant for a conference.* Mr. Wilson did visit appellant later and spoke to him for about a quarter of an hour concerning getting a bondsman for him.*

Appellant did not see Mr. Wilson again until April 22, 1965, the day of appellant's arraignment on an indictment of twelve counts under 18 U.S.C. §§ 495, 1708.* On that day Mr. Wilson visited appellant in the cell block where appellant was awaiting arraignment.* Mr. Wilson asked if appellant would like Mr. Wilson to represent him at the arraignment, and appellant said that he would.* Mr. Wilson did not ask appellant how he would plead or discuss arraignment procedures with him.* Appellant pleaded not guilty to the twelve counts.

At arraignment appellant was denied the effective assistance of counsel. He had not had an opportunity to consult with counsel concerning the significance of a plea,

the validity of the indictment, or the legal significance of the facts known to him. The counsel retained by appellant's wife had not discussed the case with appellant and seemingly did not consider himself to be appellant's counsel until shortly before the arraignment.* From this it may be inferred that counsel had not investigated the appellant's case.

It is well-established that the Sixth Amendment right to counsel includes the right to consult with counsel and to be represented by counsel who has had an opportunity to prepare a case. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932). In that case the Supreme Court stated, "[A] defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense." Id., at 59.

This right to consultation with counsel and preparation by counsel is not satisfied merely because a defendant has counsel if counsel fails to prepare or to request an opportunity to prepare. The Supreme Court in the Powell case stated, "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say

what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate." Id., at 58.

In Gray v. United States, 112 U.S. App. D.C. 86, 299 F.2d 467 (D.C. Cir. 1962), this Court recognized that failure of counsel to consult with his client could be the basis of a denial of the Sixth Amendment right to counsel. In that case appellant alleged that his court-appointed counsel had conferred with him only once for five or ten minutes prior to trial. This Court affirmed appellant's conviction on the ground that the District Court had found as a fact that appellant's attorney had consulted with him five or six times.

Also, this Court has recognized that failure of counsel to prepare deprives an accused of his right to counsel. In Gadsden v. United States, 96 U.S. App. D.C. 162, 223 F.2d 627 (D.C. Cir. 1955), appellant had been represented at sentencing by his counsel's law partner. The Court declared that counsel must have an adequate opportunity to prepare for such a hearing. "But here there is no showing that the substituted counsel had so prepared, or, indeed, had any opportunity to do so; and at the hearing he made no effort to speak on appellant's behalf." 223

F.2d, at 631. Here the Court made no distinction between a negligent failure to prepare or request time to prepare by counsel and a court-imposed lack of opportunity to prepare.

Moreover, the Court recognized that the right to prepared counsel is not limited to the trial itself but rather extends to other proceedings in which, because of their importance and the possibilities of prejudice to the accused, the right to counsel is recognized. The Supreme Court has recognized that arraignment may be such a proceeding, as has this Court. Hamilton v. Alabama, 368 U.S. 52 (1961); see Edwards v. United States, 78 App. D.C. 226, 139 F.2d 365, 368 (D.C. Cir. 1943), cert. denied, 321 U.S. 769 (1944).

It has been held that the lack of counsel at arraignment is not a ground of reversal if the defendant pleaded not guilty, since that plea precludes any prejudice from the denial of the right to counsel. McGill v. United States, 348 F.2d 791, 794 (D.C. Cir. 1965). In this case, appellant did plead not guilty at arraignment. However, the lack of effective assistance of counsel at arraignment is one aspect of a pervading lack of assistance to the appellant

throughout the proceedings against him. As such, it tends to show the later lack of effective assistance at the time of the guilty plea and the coercive atmosphere in which that plea was eventually made.

D. Pretrial Preparation -- Appellant Was Deprived of the Effective Assistance of Counsel by Counsel's Failure To Prepare for Trial.

After arraignment appellant saw Mr. Wilson only when he had been released on bond and went to Mr. Wilson's office to request him to withdraw from the case.* Appellant then retained Raymond Brownlow to represent him.* Mr. Brownlow entered his appearance as appellant's attorney on June 8, 1965, two weeks before the trial.

No motions were made on behalf of appellant before trial. No subpoenas for defense witnesses were requested or issued. In fact, nothing in the record indicates any efforts to prepare a defense.

That little was done in preparation is perhaps most vividly illustrated by counsel's admission at the trial that he did not know appellant's previous criminal record. (Tr. 87.) Whether a defendant has a previous record is an essential factor in determining whether he should take the witness stand in his own defense. One of the most basic issues in preparation of a defense is whether the defendant should take the stand. This issue was evidently not considered by counsel, either because of ignorance or negligence.

Moreover, there is no indication that defense counsel considered presenting a handwriting expert as a witness in this forgery case. In fact, at trial defense counsel agreed not to mention the adverse inferences to be drawn from the Government's failure to introduce a sample of appellant's handwriting into evidence. (Tr. 77, 79.)

Counsel's lack of investigation of the facts and law relevant to appellant's case or his inability to evaluate the information obtained through investigation is evidenced throughout the trial by the lack of presentation of any defense, the inability to cross-examine witnesses, an admission by counsel of his ignorance of relevant law (Tr. 72), and the commission of several prejudicial errors. The conduct of the trial is discussed in subpart E below. This lack of the most rudimentary preparation rendered the trial "a mockery and a farce." Mitchell v. United States, 104 U.S. App. D.C. 57, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

This Court has recognized that the negligent failure by counsel to prepare a defense is a basis for a successful challenge to the effectiveness of counsel's assistance. For instance, in Johnson v. United States, 71 U.S. App. D.C. 400, 110 F.2d 562 (D.C. Cir. 1940), a conviction was reversed on

the ground that trial counsel had failed to investigate the records of a coroner's inquest which contained corroborating testimony. In Jones v. Huff, 80 U.S. App. D.C. 254, 152 F.2d 14 (D.C. Cir. 1945), ineffective assistance of counsel was established in part by the fact that trial counsel in a forgery case had failed to call witnesses, obtain a handwriting expert on a forgery issue, enter into evidence a specimen of defendant's handwriting, or present any other defense. See Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).

In a few cases failure to subpoena, call, or examine defense witnesses has been held not to establish the ineffective assistance of counsel when there were reasons for counsel to believe that their testimony would be adverse, Bolden v. United States, 105 U.S. App. D.C. 259, 266 F.2d 460 (D.C. Cir. 1959), and where counsel had used his best efforts to contact witnesses, Gray v. United States, 112 U.S. App. D.C. 86, 299 F.2d 467 (D.C. Cir. 1962). Moreover, in some cases this Court has held that the failure to call witnesses was not prejudicial, Moore v. United States, 95 U.S. App. D.C. 92, 220 F.2d 198 (D.C. Cir. 1955), or constituted a legitimate trial tactic, Burton v. United States, 80 U.S.

App. D.C. 208, 151 F.2d 17 (D.C. Cir. 1945), cert. denied, 326 U.S. 789 (1946). In this case trial counsel made no preparation for trial. His inadequacies in presenting a defense resulted, not from legitimate trial tactics, but from ignorance of the relevant facts and law. The prejudice from a lack of the most elementary preparation is obvious.

E. The Trial

Trial was held on June 22, 1965, at which time a Government motion to dismiss three of the twelve counts was granted.

1. Voir dire.

During the Government's examination of the prospective jury, the following occurred:

> "[ASSISTANT UNITED STATES ATTORNEY TITUS:] Do any of you know any of the witnesses who stood on the other side of the courtroom and those who are on their way to court that I mentioned?
>
> ". . .
>
> "MISS GAVIN: My name is Anita Gavin. I know Miss Russ.
>
> "MR. TITUS: Miss Venita Russ, the witness?
>
> "MISS GAVIN: Yes.
>
> "MR. TITUS: Would that fact cause you to be prejudiced one way or the other if chosen as a juror?

"MISS GAVIN: No.

"MR. TITUS: Could you come to a fair decision based on all of the evidence in the case?

"MISS GAVIN: Yes." (Tr. 8.)

Appellant's counsel declined to ask any questions on voir dire. (Tr. 10.) He did not even establish how Anita Gavin knew the witness. Anita Gavin was then chosen as juror number 5 (Tr. 10) and was not challenged by appellant's counsel or by the Government. The witness, Miss Russ, later testified for the Government that appellant had forged the endorsement on a check involved in three of the nine counts on which appellant was tried. She was the sole witness who identified appellant as having this check in his possession and as having signed and cashed it. No other testimony linked appellant with the check.

a. Appellant was deprived of his right to an impartial jury. The Sixth Amendment of the United States Constitution guarantees trial by an impartial jury. This right includes the right to challenge for cause jurors shown to be biased. Defense counsel, by his failure to participate in voir dire and by his failure to challenge Miss Gavin, allowed the substantial possibility that a biased juror would

consider the sole testimony identifying appellant as having committed the crimes charged in three counts of the indictment. He thus waived appellant's right to assurance of an impartial jury.

Whether the failure to challenge biased jurors constitutes waiver of the Sixth Amendment right to trial by jury or of the statutory right to challenge jurors, the prejudice resulting from the waiver in these circumstances is potentially so great that a knowing waiver on the part of the defendant should be required. Cf. United States v. Houpt, 136 F.2d 661 (7th Cir. 1943). No such waiver occurred in this case.

This court has held that waiver by counsel of the right to trial by jury constitutes waiver of the right by the defendant unless defendant repudiates counsel's waiver. Hensley v. United States, 281 F.2d 605 (D.C. Cir. 1960). This decision should be reconsidered. As the dissenting opinion in that case stated,

> "I see no sufficient reason to think he knew he was at liberty to repudiate what his counsel had done; or that he knew he was at liberty to speak up in open court without being invited to speak. For all we know, he may even have thought he would be punished for contempt if he spoke up. And the question whether he was at liberty to repudiate his counsel's action, or to volunteer a statement of his own wishes, may not even have occurred to him." 281 F.2d at 609-10.

Moreover, it is highly improbable that defense counsel would have an opportunity to consult with the accused concerning waiver of voir dire and, especially, of challenge to particular jurors. It is much more probable that consultation would occur concerning waiver of trial by jury as in Hensley. In this case nothing on the record indicates that appellant was consulted concerning the waiver. This Court has recently implied that counsel cannot waive fundamental constitutional or statutory rights without consultation with his client. Hairston v. United States, No. 19594, decided March 31, 1966, slip op. p. 2; see Brookhart v. Janis, 34 U.S.L. Wk. 4351 (U.S. April 18, 1966).

Even if the failure to challenge a juror such as Miss Gavin by counsel were held to bind appellant, the fact that Miss Gavin was a juror would have a coercive effect on appellant. This coercion must be considered by this Court in considering the voluntariness of appellant's subsequent plea of guilty. There is no reason to believe that appellant realized that his counsel had the power to challenge Miss Gavin. He might well have assumed from the selection of the jury that a defendant is powerless to avoid being tried by acquaintances of the Government's witnesses. Before the

plea of guilty was made, appellant was aware that his identification by Miss Russ would be a crucial factor in determining his guilt on three counts and would be evaluated by one of her acquaintances. Under these circumstances a layman might well decide that a plea of guilty to one count was his only alternative to a jury verdict of guilty on three counts. A decision to plead guilty on these grounds is not voluntary.

b. Appellant was deprived of the effective assistance of counsel by counsel's neglect to ask questions on voir dire and to challenge a possibly biased witness. Defense counsel's failure to ascertain the relationship between a prospective juror and a principal Government witness whom the juror admitted knowing and his failure to challenge the juror constitute ineffective assistance of counsel. No "trial tactics" justify this omission by counsel. He did not neglect to conduct voir dire or to challenge Miss Gavin because he wanted to avoid arousing the jury's antagonism, for he in fact challenged two jurors. This omission could not have been intended to gain any trial advantage. It could only have been the result of lack of attention or interest by counsel.

The prejudice caused by this failure of counsel is sufficient to require reversal of appellant's conviction. If the case had gone to the jury, a possibility of a biased verdict would have existed. The knowledge of this possibility was certainly a coercive factor in appellant's decision to plead guilty. Consecutive sentences of twenty-one years would have been possible if the jury had convicted appellant on the three counts concerning which Miss Russ testified. No defendant should be subjected to the fear of a biased jury because of inexcusable neglect of his counsel.

2. Opening statement.

The failure to make an opening statement deprived appellant of the effective assistance of counsel. The Government made a lengthy opening statement. (Tr. 13-20.) Defense counsel reserved opening statement. At this point in the proceedings appellant began to protest the reservation and to state that he did not want to be represented by Mr. Brownlow.* However, he thought that such a protest would be pointless.*

While reservation of the opening statement is often a legitimate defense tactic, in the circumstances of this case it is a further indication of the lack of preparation of a defense and of the passive role of appellant's counsel

throughout the proceedings against him. The failure to make such a statement combined with the later inept and insufficient cross-examination of Government witnesses and the lack of any indication that a defense had been prepared shows the fact that appellant was virtually without aid from his counsel. Appellant's realization of that fact added to the coercion to plead guilty.

3. Cross-examination.

Defense counsel never inquired of the Government prosecutor whether any Jencks Act statements of any of the six Government witnesses were available. He made no attempts to obtain the grand jury minutes for purposes of impeachment.

The first Government witness, Richard Fitzhugh, was seventy-two years old. He testified that the lock of his mail box had been broken and that he had not received one of his regular monthly social security checks in the amount of $114 sometime after Christmas, 1964. (Tr. 24.) The check involved in counts one through three of the indictment was issued in November, 1964. Although the witness testified that the endorsement on the November, 1964, check was not his writing, he could not see the date of the check, testifying, "My glasses need changing." (Tr. 26.) He also testified that he had never seen appellant before. (Tr. 27.)

On cross-examination, defense counsel questioned the witness concerning the date he missed his check. He did not question the witness concerning his ability to see the endorsement of the check. Cross-examination constitutes one page of the ninety-page transcript. (Tr. 28-29.)

At the Court's suggestion, the prosecutor established on redirect examination that the witness had never done business at the liquor store later shown to have cashed the check. (Tr. 20.) On recross-examination constituting half a page of the transcript, defense counsel established that the witness had always cashed his checks at a bank. (Tr. 30.) The witness was then excused.

The second Government witness, William Leon Pappas, testified that he had cashed the check involved in counts one through three of the indictment for the appellant, who had shown him a Maryland driver's permit in the name of Richard Fitzhugh as identification and had signed the check. He testified that the check was thereafter returned to him as having been forged. (Tr. 33.) No objection to this statement as hearsay was raised by defense counsel. The witness also testified that he had seen appellant for eight or ten years and that appellant had previously been a customer in his liquor store.

On cross-examination, defense counsel asked the witness if the driver's license was a sufficient identification for cashing a check and inquired concerning the witness' previous knowledge of appellant, eliciting the fact that the witness knew where appellant had worked. Cross-examination constitutes one page of the transcript. (Tr. 36-37.)

On redirect examination, it was established that the witness had written an erroneous place of work on the check because he had confused two companies. The check was then received in evidence over the objection of defense counsel that it was inadmissible because the payee had testified that he had lost a check after rather than before Christmas, 1964.

A recross-examination, constituting one page of the transcript, was conducted. It concerned the source of the witness' information as to where appellant worked.

The third Government witness, Robert Coates, Jr., testified concerning the cashing of the $105 check involved in counts four through six of the indictment. He identified the check as having been cashed by him for appellant who endorsed the check and used a social security card and a driver's permit as identification. The witness testified

that he had seen appellant previously when he was a customer in the liquor store in which the witness worked.

On cross-examination, constituting one page of the transcript, defense counsel elicited that the witness had seen appellant seven or eight times before the cashing of the check, that he had not known the appellant's name, that the owner of the liquor store had witnessed the cashing of the check, and that the witness did not have the authority to cash checks. (Tr. 49-50.)

The $105 check was introduced into evidence without objection.

The fourth Government witness, Marshall H. Thomas, Jr., testified concerning the $69.39 check involved in counts ten through twelve of the indictment. He testified that he had not received a check due in January, 1965, of the type involved in the indictment. He testified that the endorsement on the check was not in his handwriting, that he had not given anyone permission to cash it, and that he did not know the defendant. Defense counsel asked no questions of the witness. (Tr. 57.)

The fifth Government witness, Robert J. Graham, testified that he had drawn the $69.39 check and that it was mailed

to the payee. No cross-examination was made, although the court itself asked the witness further questions. (Tr. 60.)

The sixth Government witness, Venita Russ, testified that she cashed the $69.39 check for appellant, whom she recognized as a customer but whose name she did not know. Appellant, she testified, had endorsed the check in her presence. The check was received in evidence without objection.

On cross-examination defense counsel elicited the fact that the witness had cashed another check of the same type for appellant and had refused to cash a third check he attempted to cash. (Tr. 67-68.) Of less than three transcript pages of cross-examination, one and a half pages dealt with the subject matter which had elicited the testimony concerning the other checks, and the witness referred to them three times. (Tr. 67-68.)

The inadequacy of cross-examination of Government witnesses constituted the ineffective assistance of counsel. Counsel's cross-examination of the six Government witnesses against appellant constitutes seven and a half pages of the transcript. Counsel did not even attempt to cross-examine two of the witnesses. He made no attempt to obtain the

previous statements of witnesses with which to impeach them. No questioning as to previous criminal convictions relevant to veracity was presented. Many obvious lines of questioning were ignored. For instance, defense counsel failed to ask the first Government witness, who could not see the date on a check, how he could see the endorsement on it clearly enough to swear it was not his signature. The quality of the cross-examination raises a reasonable inference that counsel had not attempted to interview the Government's witnesses and that, in fact, he had failed to prepare for trial in any way.

This Court has often heard allegations of ineffectiveness of counsel based on the failure to cross-examine,[1/] the failure to impeach Government witnesses,[2/] or the failure to

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1/ Carter v. United States, 108 U.S. App. D.C. 225, 281 F.2d 58 (D.C. Cir. 1960) (per curiam) (Failure to cross-examine one adverse witness); Mitchell v. United States, 104 U.S. App. D.C. 57, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

2/ Williams v. United States, 108 U.S. App. D.C. 384, 282 F.2d 867 (D.C. Cir. 1960) (per curiam), cert. denied, 365 U.S. 836 (1961) (failure to impeach complaining witness by use of Jencks Act statement); Tolliver v. United States, 106 U.S. App. D.C. 398, 273 F.2d 523 (D.C. Cir. 1959) (per curiam) (failure to impeach one adverse witness).

interview prosecution witnesses before trial.[1] In each of those cases the Court refused to find that the assistance of counsel was ineffective. However, the facts in all of the cases but one[2] clearly distinguish the cases from appellant's case. In those cases appellants challenged the effectiveness of their counsel on much narrower bases then in this case -- on failure to cross-examine one witness, or on failure to request Jencks Act statements, or on failure to interview witnesses before trial. Here counsel's failure to prepare at all for cross-examination of any of the witnesses is challenged.

The prejudicial effects of counsel's failure to prepare for cross-examination are clear. It, in conjunction with counsel's ineptitude or lack of attention to direct examination, resulted in the most sketchy type of cross-examination or in no cross-examination at all. Much of the cross-examination consisted of questions which led the witnesses to reaffirm, in even stronger terms, their testimony on direct examination. For instance, one of the eight questions asked by defense

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1/ Frost v. United States, 111 U.S. App. D.C. 414, 298 F.2d 328 (D.C. Cir.) (per curiam), cert. denied, 370 U.S. 946 (1962).

2/ Mitchell v. United States, supra. The facts in that case are not stated in sufficient detail to determine the basis for the allegation of ineffective assistance of counsel.

counsel on cross-examination of William Pappas, who identified appellant as having cashed the check involved in counts one through three, was: "Q. Now you are absolutely certain that this transaction took place just as you have described it here? A. Yes, sir." (Tr. 37.) Only one other question in this witness' cross-examination dealt with the details of the check-cashing transaction.

Perhaps most prejudicial was defense counsel's eliciting of appellant's attempts to cash forged checks other than those involved in the indictment. (Tr. 67-68.) The cross-examination of the witness, Miss Russ, seems almost to have been directed toward eliciting evidence of the prior bad acts. Certainly counsel showed no awareness of the prejudice he was causing appellant by eliciting this evidence. Yet the prejudicial nature of such evidence is well-established, and such evidence is subject to exclusion in some circumstances. In the particular situation of appellant's case the testimony was especially prejudicial because it was given by Miss Venita Russ, the acquaintance of one of the jurors, who would be likely to believe the testimony. Yet defense counsel neither discontinued his line of questioning nor asked the court to strike the testimony and to tell the jury to disregard it. Counsel

was either unaware of the prejudice he was causing or acted in reckless disregard of it.

No possible "trial tactics" could justify the ineptness of defense counsel's cross-examination. Ignorance and lack of preparation or interest caused this aspect of the trial to be "a mockery and a farce." This Court should reverse appellant's conviction on the basis of ineffective assistance of counsel.

It is also clear that the prejudice to the appellant caused by the cross-examination was another aspect of the coercion to plead guilty. It must have beer obvious to appellant that he was not defended and, in fact, that his counsel had established additional crimes for which he might be indicted.

4. Defense objections to evidence and waiver of defense during trial -- Appellant was deprived of the effective assistance of counsel.

Defense counsel made very few objections to the admission of evidence during the trial. He made no objections to hearsay evidence. He did object to the reception into evidence of Government's Exhibit No. 1, the check involved in the first three counts of the indictment. He objected on the ground that the payee had testified that he had not received a check after Christmas, 1964, while Government's Exhibit No. 1 had been dated and cashed in November, 1964. (Tr. 38-39.) However, the exhibit had been identified by William Pappas, who testified he had cashed it for appellant. (Tr. 32.)

The only other objection by defense counsel arose in the following context. The Government prosecutor stated that he intended to present the testimony of a retired detective from the check and fraud squad of the police department who had taken a handwriting sample from appellant in 1959. (Tr. 69-70.) The handwriting sample was on a police handwriting card relating to a previous

forgery conviction of appellant. The prosecutor suggested that the card should have all information except the date of the sample and the sample itself blotted out, so that the jury would not be aware of the previous criminal conviction. It was then agreed that the date would also be blotted out and that the former detective would not refer to the date. Defense counsel objected, suggesting that the jury might believe that the appellant had voluntarily made an admission upon arrest. (Tr. 72.) However, his statement of the grounds to the objection is garbled, and he admitted, "I fail to understand this at all. I don't even understand what the basis of the objection is." (Tr. 72.) Subsequently, the prosecutor agreed not to introduce the card into evidence on the condition that defense counsel waive his right to argue that inferences adverse to the Government could be drawn from the Government's failure to introduce a handwriting sample. Defense counsel so agreed, waiving a substantial argument in appellant's favor. (Tr. 77.) Defense counsel subsequently regretted his waiver. (Tr. 79-80.)

Defense counsel's waiver of this defense constituted ineffective assistance of counsel. Having failed to present any kind of defense and having failed to cross-examine Government witnesses effectively, defense counsel waived one of the only defenses left to him, the drawing of negative implications from weaknesses in the Government's case. He himself soon recognized that in so doing he had substantially prejudiced appellant's defense. (See Tr. 79-80.)

5. The Luncheon Recess.

The trial was recessed for lunch during the presentation of the Government's case. During the luncheon recess defense counsel took appellant to a liquor store where they bought a bottle of whisky.* They returned to the District of Columbia Court of General Sessions building where they each had several drinks before the trial resumed.* Defense counsel then discussed the possibilities of a plea of guilty to one count, telling appellant that the Government had promised to dismiss the remaining counts of the indictment.* Appellant at that time refused to agree to plead guilty.* The afternoon session of the trial began at 1:45 p.m. (Tr. 77.)

It was not until approximately 2:25 p.m. that appellant agreed to plead guilty to one count. (Tr. 81-A.)

a. Defense counsel's drinking during recess deprived appellant of the effective assistance of counsel. This Court has recognized that counsel's intoxication during trial deprives a defendant of the effective assistance of counsel. In Mitchell v. United States, 104 U.S. App. D.C. 57, 259 F.2d 787 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958), this Court refused to hold that an appellant had been denied the effective assistance of counsel. However, the Court was careful to say, "We are not considering a case of alleged physical or mental disability on the part of counsel, or of intoxication, fraud or misrepresentation, dual interest, insufficient time for preparation, or inadequate notice. Such situations have special features." 259 F.2d at 789. (Emphasis added.)

If appellant's affidavit concerning defense counsel's drinking during recess in the D.C. Court of General Sessions building while trying to persuade appellant to plead guilty is true, defense counsel's attitude toward the seriousness of the criminal process and of his duty to defend appellant

throws great suspicion on his effectiveness as counsel. Appellant, knowing that his defense counsel had been drinking, might well have believed that he would receive little or no assistance from counsel during the afternoon session of his trial and therefore have decided to plead guilty. A plea of guilty under such circumstances would not be voluntary. If this Court believes that this issue is determinative of this appeal, the Court should direct the District Court to hold a hearing concerning the facts stated in appellant's affidavit.

b. Appellant's drinking during recess may have rendered his subsequent plea of guilty involuntary. On this question also, this Court should direct a District Court hearing if the issue is thought to be determinative.

6. The plea - Appellant was denied the effective assistance of counsel by counsel's ignorance of the count to which appellant pleaded guilty.

At 2:25 p.m., during the Government's case, appellant decided to plead guilty to one count. At that time the following occurred during a bench conference:

> "MR. BROWNLOW: I have further consulted with the defendant, Your Honor. He will enter a plea of Mr. Titus' to what count?

"MR. TITUS [Government prosecutor]: One count of forgery.

"MR. BROWNLOW: He will do that.

"THE COURT: All right.

"MR. BROWNLOW: Now I am advising Your Honor of the consequences and what it entails to enter a plea to this charge and he is aware of it.

"THE COURT: All right."

(Tr. 81-A - 81-B.) (Emphasis added.)

From defense counsel's own statement it is clear that he did not know the count of the indictment to which appellant was to plead guilty. Knowledge of the count was necessary in order to determine the possible sentences on the plea of guilty. Appellant was tried on nine counts, involving three checks and two statutes. 18 U.S.C. §§ 495, 1708 (1964). For each count based on 18 U.S.C. § 495 appellant could have received a maximum sentence of ten years imprisonment. Maximum sentences under 18 U.S.C. § 1708 depend upon the amount of the check involved in the count. The maximum sentence on the two checks valued at over $100 would have been five years imprisonment, while the maximum sentence on the check worth $69.39 would have been one year imprisonment. Thus, depending upon the count to which appellant pleaded guilty, he could have been sentenced to a maximum of ten, five or one years.

In fact, count one of the indictment to which appellant pleaded guilty, carried a ten-year maximum sentence, a fact of which defense counsel was obviously unaware.

The failure of defense counsel to know to which count appellant was to plead guilty shows that his advice to appellant could not have been well-informed. Counsel who failed to do the minimum preparation to determine sentences and who was not sufficiently knowledgeable concerning the case to know to which count his client would plead guilty is no more helpful than no counsel at all. If defense counsel took any interest at all in appellant's case, it was reflected only in urging him to plead guilty to charges counsel did not know.

This failure of counsel to assist appellant constitutes a denial of appellant's Sixth Amendment right to counsel, requiring reversal of appellant's conviction and a withdrawal of his plea of guilty. The Supreme Court has held that lack of counsel when a plea of guilty is made vitiates the plea of guilty. The Court held, "If he did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering

a guilty plea, he was deprived of a constitutional right." Walker v. Johnston, 312 U.S. 275, 286 (1941). This Court has recognized the same rule. Edwards v. United States, 103 U.S. App. D.C. 152, 256 F.2d 707 (D.C. Cir.), cert. denied, 356 U.S. 847 (1958) (dictum); see Evans v. Rives, 75 U.S. App. D.C. 242, 126 F.2d 633 (D.C. Cir. 1942).

This Court has also recognized that the ineffective assistance of counsel during the guilty plea might be a basis for vitiating the plea. For instance, in Smith v. United States, 116 U.S. App. D.C. 1, 324 F.2d 436 (D.C. Cir. 1963), cert. denied, 376 U.S. 957 (1964), appellant had made a motion under section 2255 to vacate a judgment entered pursuant to a plea of guilty. Appellant's counsel had failed to inform him that if he pleaded guilty he would not be eligible for parole or probation. Appellant asserted that this constituted the ineffective assistance of counsel. The Court held that failure to inform a client concerning these peripheral aspects of a guilty plea did not constitute the ineffective assistance of counsel. The Court did recognize that ineffective assistance of counsel, if shown, would have been a basis for vacating the judgment.

Appellant's case for ineffective assistance of counsel is much stronger than that in the Smith case. In Evans v. Rives, 75 U.S. App. D.C. 242, 126 F.2d 633 (D.C. Cir. 1942), this Court stated the ways in which counsel could be of assistance in the making of a guilty plea:

> "The importance to an accused of the assistance of counsel in the event of a plea of not guilty and trial is patent. It is equally important to an accused, in determining in what manner he may properly meet a charge and before a decision as to the nature of his plea, to have the advice of counsel concerning, for example, the sufficiency of the indictment, the possible existence of a defense or bar under facts known to the accused but the legal import of which he may not know, the nature of the penalty provided for the offense charged, and the probable extent to which it will be imposed, under the facts involved, in the event of a plea of guilty." 126 F.2d at 637. (Emphasis added.)

The statutory penalty for violation of the crime charged is much easier for counsel to ascertain and much more relevant to the decision to plead guilty than the provisions of other statutes regulating parole or probation. Moreover, defense counsel in the Smith case was not alleged to have been ignorant as to the count to which the plea of guilty was directed.

Other cases in this Court denying section 2255 motions based on ineffectiveness of counsel at a plea of guilty depended upon the conclusory terms of the motion, Dayton v. United States, 115 U.S. App. D.C. 341, 319 F.2d 742, 743 (D.C. Cir.), cert. denied, 375 U.S. 947 (1963), or involved allegations that advice to plead guilty constituted ineffective assistance, Moore v. United States, 101 U.S. App. D.C. 412, 249 F.2d 504 (D.C. Cir. 1957).

However, one case seems to suggest that, if a guilty plea has been made, ineffective assistance of counsel is relevant only insofar as it establishes that the guilty plea was made involuntarily or ignorantly. In Edwards v. United States, 103 U.S. App. D.C. 152, 256 F.2d 707 (D.C. Cir.), cert. denied, 356 U.S. 847 (1958), the Court stated:

> "While the accused may have to take the consequences of a poor defense, he may at least say the fault was not his own. But this is not so when he pleads guilty. Here the deed is his own; here there are not the baffling complexities which require a lawyer for illumination; if voluntarily and understandingly made, even a layman should expect a plea of guilty to be treated as an honest confession of guilt and a waiver of all defenses known or unkown. . . .

> [W]e find it difficult to imagine how 'manifest injustice' could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel. Certainly ineffective assistance of counsel . . . is immaterial in an attempt to impeach a plea of guilty, except perhaps to the extent that it bears on the issues of voluntariness and understanding." 256 F.2d at 709-10.

First, this holding seems to be contrary to this Court's decision in Evans v. Rives, supra. Secondly, ineffective assistance of counsel is clearly relevant to the voluntariness and the intelligence of a plea of guilty. The failure of defense counsel to know the count on which appellant was to plead guilty creates a strong probability that appellant pleaded guilty ignorantly. Moreover, as we argue below in subpart I, the ineffectiveness of counsel throughout the proceedings did render the plea involuntary. Thirdly, this case clearly meets the stringent test for ineffectiveness of counsel established by the Edwards case: "[T]aken as a whole the trial was a 'mockery of justice.'" 256 F.2d at 708. Fourthly, counsel's ineffectiveness was so great that appellant was in fact in no better position than he would have been if he had been without counsel, and surely appellant, who had done his utmost to obtain counsel, did not voluntarily waive counsel's assistance.

F. The Mental Examination - Appellant Was Denied the Effective Assistance of Counsel by Counsel's Failure To Request a Determination of Competency to Plead Guilty.

On July 7, 1965, appellant appeared before the District Court for imposition of sentence. His counsel, Raymond Brownlow, at that time moved for a deferral of sentencing and a referral of appellant to St. Elizabeth's for sixty days for mental examination. The Court granted this motion under the authority of D. C. Code § 24-301(a). The Court requested that a mental examination be conducted concerning only whether appellant was "mentally competent to understand the sentencing proceedings against him . . . . " The report from St. Elizabeth's discussed only this aspect of appellant's mental capacity. It stated that appellant was competent on August 30, 1965, to understand the sentencing proceedings, but added that he was "suffering from hypertension and diabetes mellitus."

Presumably defense counsel made no request, at the time of his motion, for an examination concerning whether appellant had been competent to plead guilty on June 22, 1965, fifteen days earlier. Yet to succeed in a motion

under D. C. Code § 24-301(a), defense counsel had to present to the court "prima facie evidence . . . that the accused is of unsound mind or is mentally incompetent . . . to understand the proceedings." If defense counsel had such evidence on July 7, 1965, he certainly should have had doubts concerning whether appellant had been competent to plead guilty only fifteen days earlier. At the least, he should have requested an evaluation by St. Elizabeth's of appellant's competency on June 22, 1965. Presumably appellant's sixty-day detention at St. Elizabeth's would be sufficient time to make both determinations, and St. Elizabeth's facilities would not be strained by such a request. Moreover, defense counsel could have made a motion to withdraw the plea of guilty based on the facts relating to appellant's lack of competency. Defense counsel's failure to take either of these steps may be some further evidence of his ineffectiveness.

G. Sentencing - Appellant Was Denied the Effective Assistance of Counsel by the Inadequacy of Counsel's Plea in Mitigation

On September 10, 1965, appellant again appeared

before the District Court for sentencing on one count of violating 18 U.S.C. § 495 (1964), carrying a maximum sentence of ten years. The sentencing judge asked defense counsel to describe appellant's mental and physical condition. After a brief description, defense counsel made his plea in mitigation. He stated, "I am certain it [the probation report] must be full and complete; and that no investigation by me nor any statements by me not having been made in this matter, could possibly influence the judgment of the Court in this matter." (Sentencing Tr. 4.) He then "point[ed] out" three facts in mitigation: that the crime involved no violence; that appellant had partially cooperated by pleading guilty; and that appellant's physical condition was poor. These were stated in three sentences and in the most general terms. Defense counsel did not particularize any of these statements, even insofar as stating that appellant's non-violent offense was forgery. His entire plea in mitigation is contained in one page of the transcript.

The Court itself was left to inquire of the appellant concerning his employment history, his army service, his

previous criminal record, his family situation, and the amount of time he had been incarcerated on the charge. (Sentencing Tr. 5-7.) The Court then sentenced appellant to imprisonment for eighteen-to-fifty-four months.

This Court has recognized that a defendant must be represented by counsel at sentencing. See, e.g., McKinney v. United States, 93 U.S. App. D. C. 222, 208 F.2d 844 (D.C. Cir. 1953). Moreover, the Court has recognized the need for effective assistance of counsel at this stage in the proceedings. In Gadsden v. United States, 96 U.S. App. D. C. 162, 223 F.2d 627 (D.C. Cir. 1955), appellant's court-appointed counsel had visited the sentencing judge in chambers on the day of sentencing to discuss the case. Since this counsel had other obligations during the time of the sentencing proceedings, her law partner appeared for appellant and stated that he could add nothing in mitigation. This Court stressed "the critical importance of affording appellant an effective opportunity to inform the sentencing court of any and all mitigating circumstances." 223 F.2d at 630. The Court held, "since the present record gives no

assurance that such an opportunity was afforded, we vacate the sentences and remand to the District Court for re-sentencing after affording such opportunity." Ibid. "[H]ere there is no showing that the substituted counsel had . . . [adequately] prepared, or, indeed, had any opportunity to do so; and at the hearing he made no effort to speak on appellant's behalf." Id. at 631.

The situation in the present case is similar. From counsel's presentation of the mitigating circumstances, it is clear that he had not investigated appellant's background or prepared a plea in mitigation. Rather, he deferred to the probation report. The generality, vagueness, and incompleteness of his remarks rendered them useless to a judge attempting to impose a sentence according to appellant's need for rehabilitation and degree of guilt. A similar case of totally inadequate representation during sentencing is Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963), where the Ninth Circuit held that the District Court had a duty to hold a hearing on a petition for a writ of habeas corpus based on

the allegation of ineffective assistance of counsel.

The inadequacy of appellant's representation at sentencing constitutes an independent ground on which this Court may vacate appellant's sentence and remand to the District Court for resentencing. See Gadsden v. United States, supra.

H. The Notice of Appeal - Appellant Was Denied the Effective Assistance of Counsel by Counsel's Failure to Note an Appeal

At sentencing on September 10, 1965, the sentencing judge stated to the appellant that he had ten days in which to notice an appeal. (Sentencing Tr. 7.) Defense counsel, despite this strong hint to appeal, failed to notice an appeal. Appellant himself noticed the appeal.

It is not contended that defense counsel's failure to notice an appeal, in and of itself, constitutes the ineffective assistance of counsel, since no prejudice will have resulted from the failure if this Court hears this appeal. (See Part I, supra.) However, the failure in these circumstances to notice an appeal constitutes a further indication of counsel's general ineffectiveness, lack of

preparation, and failure to assist appellant in the smallest way.

This Court has often heard allegations that the failure to notice an appeal constitutes the ineffective assistance of counsel. In Edwards v. United States, 78 U.S. App. D.C. 226, 139 F.2d 365 (D.C. Cir. 1943), cert. denied, 321 U.S. 769 (1944), this Court stated in dictum that noticing an appeal is one of the stages in the proceeding requiring effective assistance of counsel. The right to counsel could be denied by "inadequate representation . . . in connection with the filing of notice of appeal, settling the bill of exceptions, designating the record and assigning errors." 139 F.2d at 368 (dictum). Moreover, failure to notice an appeal has been considered to be one factor in determining that the assistance of counsel was ineffective. See Johnson v. United States, 71 U.S. App. D.C. 400, 110 F.2d 562 (D.C. Cir. 1940).

However, the Court has rejected a contention that a failure to notice an appeal, when considered alone, is the basis for finding ineffective assistance of counsel if

counsel has failed to appeal because he has "formulate[d] a judgment that no appeal lies . . . ." Lewis v. United States, 111 U.S. App. D.C. 13, 294 F.2d 209, 211 (D.C. Cir.), cert. denied, 368 U.S. 949 (1961). In this case it is highly doubtful that defense counsel made such a judgment. He was aware of the circumstances of appellant's trial and plea of guilty. If those circumstances did not alert him to the need for an appeal, the sentencing judge's specific mention of the possibility of appealing the conviction should have alerted him.

I. The Facts of This Case, When Considered as a Whole, Establish That Appellant Was Denied a Fair Trial and the Effective Assistance of Counsel and That Appellant's Plea of Guilty Was Involuntary

Even if no specific prejudicial error or particular failure of counsel during the proceedings against appellant is an adequate basis for reversal of appellant's conviction, the record as a whole reflects a pervasive unfairness which requires the reversal of this conviction.

The record establishes that appellant, while receiving the formal aspects of representation by counsel, received no effective assistance of counsel. "Appellant does not

complain that after investigation and research trial counsel made decisions of tactics and strategy injurious to appellant's cause; the allegation is rather that trial counsel failed to prepare, and that appellant's defense was withheld not through deliberate though faulty judgment, but in default of knowledge that reasonable inquiry would have produced, and hence in default of any judgment at all." Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), cert. denied, 372 U.S. 978 (1963).

Recently some members of this Court have considered some arguments concerning ineffective assistance of counsel to be "'Disneyland' contentions." Williams v. United States, 345 F.2d 733, 734 (D.C. Cir. 1965) (concurring opinion). In this case the contentions of ineffective assistance of counsel are not frivolous. Mere trial tactics are not challenged. Instead, the facts of this case show a lack of investigation, preparation, alertness, and interest in defending appellant which rendered the proceedings against him "a mockery and a farce." "[I]f . . . [counsel's] conduct is so incompetent as to deprive his client of a trial in any

real sense . . . the accused must have another trial, or rather, more accurately, is still entitled to a trial." Mitchell v. United States, 104 U.S. App. D.C. 57, 259 F.2d 787, 793 (D.C. Cir.), cert. denied, 358 U.S. 850 (1958).

In this case the facts show that appellant's counsel waived preliminary hearing without consultation with appellant* when the hearing could have been very beneficial, did not consult with him concerning arraignment,* made little or no effort to prepare a defense or to prepare to weaken the Government's case, committed a series of prejudicial errors during trial, failed to challenge a potentially biased juror, admitted a lack of knowledge of facts and law highly pertinent to appellant's defense, admitted a lack of knowledge as to which count of the indictment appellant was to plead guilty to, drank whiskey during a recess in the trial,* failed to request an examination of appellant's mental competency to plead guilty although he necessarily had knowledge establishing appellant's incompetency prima facie, made an inadequate plea in mitigation of the sentence, and failed to notice an appeal despite a reminder by the sentencing judge concerning the time within which to appeal.

These facts establish the inadequacy of representation by counsel in a constitutional sense. Perhaps these allegations are "directed solely to the skill, the relative competency of trial counsel." Mitchell v. United States, 259 F.2d at 789. If so, it is because it is possible for counsel to be so incompetent as to fail to render any services to his client.

The denial of the Sixth Amendment right to counsel is, of itself, a basis for reversing a conviction based on a guilty plea. See Walker v. Johnston, 312 U.S. 275, 286 (1941); Evans v. Rives, 75 U.S. App. D. C. 242, 126 F.2d 633 (D.C. Cir 1942). Denial of the right to counsel is often said to be a jurisdictional defect; it should be held to vitiate a guilty plea. No proof should be required that a defendant's plea of guilty was involuntary or uninformed if it has been established that he has been denied the effective assistance of counsel. This is especially true when, as in the present case, counsel is so ineffective that his assistance is little better than no assistance at all. There is no reason to treat a defendant without any counsel more favorably than a defendant with counsel who

gave no assistance. The latter defendant has a very difficult burden of proof in showing that he was denied the effective assistance of counsel. This burden should not be increased by requiring a showing of involuntariness.

However, even if a showing of involuntariness is necessary, see Edwards v. United States, 103 U.S. App. D.C. 152, 256 F.2d 707 (D.C. Cir), cert. denied, 356 U.S. 847 (1958), the ineffective assistance of counsel should be a sufficient showing of involuntariness. This is especially true in a case in which counsel's assistance is as ineffective as in the present case. Lack of aid from counsel during trial creates a tremendous pressure to plead guilty to one count in order to avoid being tried and found guilty on all counts charged. The realization by appellant that he would receive virtually no defense coerced him to plead guilty.

Even if this case does not reach the level of deprivation of the constitutional right to counsel, this Court in its power to supervise District Court proceedings and the bar which practices before it should reverse this conviction. The unfairness of the proceedings below should not be tolerated as being within the permissible range of justice in the federal courts of the District of Columbia.

This incompetence of counsel and the various pretrial and trial errors discussed in previous parts of this Brief deprived appellant of a fair trial. Moreover, they created an atmosphere at the trial leading appellant necessarily to believe that justice would not be done unless he pleaded guilty. Having been arrested without probable cause,* having been denied a preliminary hearing without his consent,* having witnessed the ineptitude of his own counsel and the lack of tried by a biased jury, appellant's belief in the futility of the judicial process was natural. This Court should not allow such a belief to motivate a plea of guilty. A guilty plea made in these circumstances is involuntary.

Involuntariness vitiates a guilty plea.[1/] The veracity of a plea induced by the fact that a fair trial is not being afforded the accused, and therefore the product of the denial of the due process of law required by the Fifth Amendment, is subject to great doubt. Moreover, pleas of guilty induced by deprivation of a fair trial, like pleas of guilty induced by threats or physical harm, cannot be tolerated because of their source. Every accused is entitled to a fair trial. That he has pleaded guilty because he was denied a fair trial cannot be the basis for depriving him of his liberty.

CONCLUSION

For the reasons herein set forth, we respectfully request that the conviction of appellant be reversed.

/s/ Robert E. Herzstein
Robert E. Herzstein
1229 - 19th Street, N.W.
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(Appointed by this Court)

OF COUNSEL:
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1/ Machibroda v. United States, 368 U.S. 487, 493 (1962); Waley v. Johnston, 316 U.S. 101 (1942); Walker v. Johnston, 312 U.S. 275-86 (1941); United States ex rel. McGrath v. La Vallee, 348 F.2d 343 (2d Cir. 1965) (dictum); Watts v. United States, 107 U.S. App. D.C. 367, 278 F.2d 247 (D.C. Cir. 1960) (dictum).

EXHIBIT A

AFFIDAVIT

Washington, D. C. ss.

Carlisle Adkins, being duly sworn, deposes and says:

I was arrested at approximately 10:30 p.m. Monday, March 1, 1965. I was standing in a carry-out shop when a man, accompanied by two uniformed police officers, accused me of having forged a check. The officers kept me in their custody while they called the Tenth and Second Precincts. The officers said that both the Tenth Precinct officer and Lt. O'Bryant at the Second Precinct told them that they had no record of any warrant or complaint having been filed against me. However, the officers said that O'Bryant told them to hold me there while he sent two plain-clothes detectives to get me. Detectives Fred Edbers and James C. Butler finally arrived and took me to the Second Precinct. By that time it was about 12:00 p.m. At the Second Precinct, I was held until a Kenneth Thompson of the Secret Service arrived. He questioned me for a while. I was then taken to the First Precinct and fingerprinted. I was finally locked up at about 1:15 a.m.

On Wednesday, March 3, Miss Cohen from the Legal Aid Agency visited me at the D. C. Jail and discussed my case. We agreed that she would argue my case at the preliminary hearing.

On Thursday, March 4, I appeared before the U. S. Commissioner. When he called my name I went before him and Miss Cohen was beside me. The U. S. Commissioner asked who represented me and a man whom I had never seen before or talked to said that he did and that he had been retained by my wife. His name was Frederick R. Wilson. The Commissioner asked about bail, and someone from the Bail

Bond Project said that their report was favorable and recommended that I be released without bond. The Assistant U. S. Attorney said that he did not object to my being released without bond but wanted to point out to the Commissioner that I had previously been convicted of forgery. Mr. Wilson said absolutely nothing. The Commissioner decided to reduce bail from $2,000 to $1,000.

The Commissioner then asked Mr. Wilson whether he waived preliminary hearing. He said that he did. I did not say anything to the Commissioner or in any way indicate that I consented to the waiver. I had never up to that moment said anything to Mr. Wilson. As soon as Mr. Wilson said that he waived the preliminary hearing, I found myself being hustled out of the room. On my way out I asked Wilson if I could see him downstairs in the cell block. He never showed up.

I asked my wife when she visited me on about Friday, March 5, why Wilson had waived the preliminary hearing. She did not know. I asked her to have Wilson come to the Jail to talk with me. Wilson eventually came to the Jail. He said that he would try to get me out on bail. He did not talk about the charge against me. On April 22, 1965, I was arraigned. While I was waiting in the cell block to be arraigned, Wilson came in and asked me if I wanted him to represent me. I said yes. I had not seen Wilson since his one brief visit to the Jail. We never discussed the question of how I should plead at the arraignment. At the arraignment the judge asked me whether I pleaded guilty or not guilty and I told him I pleaded not guilty.

I finally got out on bail on about May 1. One of the first things I did was to go to Wilson's office and tell him that, since he had done absolutely nothing for me, I did not want him to represent me.

I then got Raymond A. Brownlow to represent me.

On Tuesday, June 22, 1965, my trial was held. When I got to the court Mr. Brownlow told me that Mr. Titus, the

Assistant U. S. Attorney, had told him that if I pleaded guilty to one count of the indictment he would drop the others. The next thing that Mr. Brownlow did was to reserve his opening statement after Mr. Titus told the jury what he was going to prove. At that point I first realized that I was not going to be getting any kind of a defense from Mr. Brownlow. When he said he reserved his opening statement, I started to get up from my chair to tell the judge that I did not want Brownlow to represent me any more, but felt that the judge would not like that since I had previously fired Mr. Wilson.

When the court declared a luncheon recess, I went out with Brownlow. We walked around the court house for a few minutes and then went to a nearby liquor store where we bought a half pint of whiskey. Then we went to the men's room in the court house and each had two or three paper cupfuls of whiskey. Brownlow again reminded me that Mr. Titus had told him that if I would plead guilty to one of the counts he would drop the others. Brownlow told me that if he were in my shoes he would plead guilty.

When we got back to the courtroom, I had decided that the only thing I could do was to plead guilty. It seemed to me that the way Brownlow was going I could be convicted on all of the counts and get probably six to eighteen years.

Carlisle Adkins

Carlisle Adkins

Subscribed and sworn to before me this 6 day of May, 1966.

D. Eugene Dyer

Notary Public

My Commission expires My Commission Expires May 24, 1966.

EXHIBIT B

AFFIDAVIT

Washington, D. C. ss.

Mrs. Carlisle Adkins, being first duly sworn, deposes and says:

On March 2 or 3, 1965, I went to the office of Frederick R. Wilson, Esq., and told him that my husband had been arrested. I could tell him nothing else because that was all that I knew. Mr. Wilson agreed to represent my husband for $50, which I paid him. On Thursday, March 4, 1965, I went to Mr. Wilson's office at about 9:00 a.m., and he and I then went together to the U. S. Commissioner's Office. Mr. Wilson said that he had not seen my husband. At approximately 9:30 a.m., the Commissioner called the name "Carlisle Adkins." My husband then appeared and stood before the Commissioner. A woman, whom I had never seen before, also moved up to the Commissioner's desk. Mr. Wilson stood up. The Commissioner asked who represented Mr. Adkins and Mr. Wilson replied that he did and that he had been hired by me.

The Commissioner discussed bail with several people present.

The Commissioner then asked Mr. Wilson whether he waived the preliminary hearing. Mr. Wilson replied that he did. My husband, to the best of my recollection, did not say anything or nod his head in agreement.

On Friday, March 5, I visited my husband at the D. C. Jail. He was very mad that Mr. Wilson had waived the preliminary hearing and said that Mr. Wilson had not discussed the matter with him and had no business waiving the hearing. He said that Mr. Wilson had not visited him,

although after Mr. Wilson had waived the preliminary hearing he had asked Mr. Wilson if he could see him downstairs in the cell block. He said that Mr. Wilson did not go down to the cell block then and had not come to the D. C. Jail to see him. I then went to see Mr. Wilson and told him that my husband wanted to see him and gave him $80 to be used for bond. My husband later told me that Mr. Wilson had visited him at the D. C. Jail once, sometime during the next few weeks, and Mr. Wilson had said that he would try to get him out on bail.

I called Mr. Wilson or stopped by his office at least twice a week from March 6 to April 30. I told him several times that my husband wanted to see him again at the D. C. Jail. To the best of my knowledge, he went to the D. C. Jail to see my husband only once.

Mr. Wilson told me on a number of occasions that he was not able to find a bondsman who would release my husband for $80. I told Mr. Wilson that I thought I could find someone who would post bond for my husband and asked to have the $80 back. Mr. Wilson did not return the money. I got another $80 together and gave that to Mickey Lewis, a bondsman, who posted bond for my husband.

Mrs. Carlisle Carrie Adkins
Mrs. Carlisle Adkins

Subscribed and sworn to before me this 6th day of May, 1966.

Dorothy M. Kerns
Notary Public

My Commission expires 1/14/69.

EXHIBIT C

AFFIDAVIT

WASHINGTON, D. C. SS.

Marilyn Cohen, being duly sworn, deposes and says that the following statements are based on a review of my notes relating to my representation of Carlisle Adkins:

On March 2 or 3, 1965, I was appointed to represent Carlisle Adkins. On March 3, I went to the D. C. Jail and discussed the case with him. I did not plan to waive the preliminary hearing which was scheduled for the following morning.

On March 4, 1965, I was present in the U. S. Commissioner's Office for the preliminary hearing of Carlisle Adkins. At that time another attorney told the Commissioner that he represented Carlisle Adkins, and I withdrew.

Marilyn Cohen
Marilyn Cohen

Subscribed and sworn to before me this 5 day of May, 1966.

Notary Public

My Commission expires My Commission Expires April 30, 1967.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been mailed this day, May 6, 1966, to Frank Q. Nebeker, Esquire, Assistant U. S. Attorney.

/s/ Robert E. Herzstein
Robert E. Herzstein